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PROCEDURE IN CRIMINAL LAW

By James B. Brooks, Dean of the College of Law, Syracuse University.

Much is being written and much is being said at the present time, touching alleged defects in the administration of the law. The criticisms that come from the Bench and the Bar relate principally to our Procedural Law and its administration. Our lawyers are well informed upon the subject of defects in the law and in its administration, and are now engaged, in such ways as are open to them, in suggesting and formulating remedies. The law's delays have always been the subject for both pleasantry and severe criticism on the part of laymen, and if such characterization of alleged deficiencies have not had the effect to work out some change, it is because reform of the great body of the law is too profound a matter to be readily formulated and effected. One provision of law may readily be substituted for another so long as the substitution does not intrude substantially upon the basic principles upon which the people have builded, and to which their common weal has a most intimate relation. But such reform can only be effected by men who know the law, of course, not simply as a collection of rules, but as a great unified system by which the people are governed and wherein any one part is organically fitted to every other part.

Patriotic criticism of the administration of the law is wholesome, and possesses genuine curative qualities and can do little harm. The spirit of the law permeates the social and industrial life of the people and steadiness and stability are of the first importance. There seems to exist a tendency to indulge in very indefinite charges against the administration of the law, and to make most sweeping assertions of its inefficiency. It is not always clear from what is said, just what is condemned, and what, if anything, is approved.

To say that our remedial code can be improved is one thing, and is well enough if one thinks that, but to say that the enforcement or administration of our remedial law is needing reform, is quite another thing. The former affects fundamental principles that are of vital importance to American citizens, while the latter concerns mainly the spirit and conduct of the bench and bar.

These two things seem to be confused in the minds of some critics, both lay and professional, and they are heard condemning things as law that are not law. This would be a harmless matter but for the baneful confusion created in the minds of many people who read and yet are not prepared to discriminate. In the last half dozen years the public press has quite persistently sounded the voice of warning to the country of the dangers that lie in the indiscriminate criticism of our courts. It has some times seemed that there has been too much made of the matter, but the danger is real. While the utterances in the way of criticism upon the decisions of our courts have not been sufficiently severe or unwise to awaken alarm, there is now abroad a spirit that does not hesitate to utter destructive criticism of both the law and its administration. If these criticisms have any effect, it is to weaken the confidence of the people in the wisdom and justice of the law, and in the efficiency of its administration. The more important, in the public thought, is the man who criticises, the more destructive is his work. Confidence in our judicial system must be preserved, and complete confidence in the patriotism, integrity and ability of those citizens to whom is entrusted the work of administering the law, must be maintained, or dangers, the worst that ever threatened a free people, will attend us.

Procedure in criminal cases has received, perhaps, the greater share of criticism. The law, it is said, is too accommodating to the accused; that it takes too long to convict him; that with all his possible defenses, he has too good a chance for an acquittal, and that when convicted he has too many privileges in the way of an appeal for a new trial, etc.

In this country any citizen indicted for a crime has the benefit of whatever defenses he may have. That which is a defense to the act charged the accused should have the benefit of. A man charged with the commission of a crime must be presumed to be innocent until he is proven to be guilty. This is the law, and I am bound to think that there are not many right-thinking men in our country who would reverse or modify this old and humane rule. Among the legal rights conferred upon the convicted man is the right to have his conviction reviewed by an appellate court. Upon the question of the propriety, justice and desirableness of these rights the people have no doubt, and when the subject is clearly presented and understood, the question will be settled by them and unhesitatingly. The people are for fairness in legal conten-

tions, and they have a wonderful faculty of detecting and arriving at the right thing in the end. Lawyers who have had large experience in trying questions of fact before a petit jury, will testify to the surprising capacity of the lay mind upon the jury to detect the fact, discern the truth in a great mass of conflicting testimony, and to work out the course of simple justice. The people can be trusted when they are permitted to know, and they will not decide until they do know.

But we are told that it takes too long to convict: When there appears to have been a crime committed, the perpetrator must be discovered, if possible. This may be accomplished in a day, a month, a year, or not at all. This part of the work belongs not to the courts but to the detective forces. When the suspected person is found and arrested, an investigation of the alleged crime is made by the grand jury, and if it is found that a crime has been committed and a *prima facie* case against the accused is made out, a formal indictment is found and reported to the court for its action.

It is sometimes said that the grand jury is antiquated, and an outgrown institution, and should, therefore be abolished. That the grand jury is not a speedy machine, may perhaps be conceded without reflecting upon its utility, as an agency in the administration of the law. It is an ancient institution. It is well on towards a thousand years of age. Its age is not an argument against its wisdom or usefulness. Whatever may have been its origin, whether in the solicitude of the sovereign King for the protection of his subjects in their legal rights, or in the spirit of the people demanding self protection from unjust and arbitrary prosecution at the will of the King, it is certain that it has stood the test as a safeguard to the civil rights of the people, and as a sure and reliable instrumentality in the discovery and punishment of crime. Instead of deteriorating and losing its vitality, as the people have advanced in civilization, it has vastly improved with age. It embodies a principle that underlies all our Procedure in Criminal Law, and as well all American governmental institutions. It has the real spirit of democracy. It is the people speaking and acting through their properly chosen representatives. The sheriff or policeman may detect, and arrest, but before a man can be put to his defense upon a criminal charge, the people through their grand jury, must have an opportunity to investigate the facts, and say by their formal act whether "all

the evidence taken before them, taken together, is such as in their judgment would, if unexplained, or uncontradicted, warrant a conviction by the trial jury." There is little opportunity for the play of improper motive in the grand jury room, and there is small chance that an accused person will escape the ordeal of a trial if the facts present a *prima facie* case. In case a true bill is found by the grand jury, the formal indictment, of course, is prepared for them by the prosecuting officer, who is the servant of the jury. The grand jury has other functions. It has power, and it is its duty, to inquire into all crimes committed or triable in the county, and to present them to the court. It must inquire into the case of every person imprisoned in the jail of the county, on a criminal charge, and not indicted; into the conditions and management of the public prisons in the county, and into the willful and corrupt misconduct in office, of public officers of every description, in the county. It has access at all times to public prisons and to examination of public records. While the people through their jury have the right to investigate the case of one charged with crime they also have the right to investigate the conduct of all their servants, and their work.

If it should be true that the proceedings in the grand jury room in some of the States can be improved in the interest of greater efficiency, that fact does not militate against the system. The acts of the jury are secret and no record is made in any case unless a true bill is found. "Every member of the grand jury must keep secret whatever he, himself, or any other grand juror may have said, or in what manner he, or any other grand juror, may have voted, on a matter before them." (New York Code.) A grand juror cannot be questioned for anything he may say, or for any vote he may give in the grand jury relative to matters legally pending before it, except for a perjury of which he may have been guilty. The care thus taken to guard safely, the name, reputation and personal character of the suspected person, is but the expression of the people's conscience.

To protect the citizen, or subject, from ill-considered and unjust suspicion is the first concern of a just government. A man's good name and repute among his fellows is his most valuable, if not his only asset in the world's affairs, and yet so delicate a thing it is, that a breath can destroy it. This is the people's program.

The grand jury admirably satisfies the purposes of the people, and I cannot think that there is any likelihood of its being abolished until popular government is abolished.

The indictment having been formulated and duly endorsed by the grand jury, the accused is taken before the court and arraigned. The manner of setting forth the offense charged in the indictment has been characterized as absurdly profuse, and prolix, and tending only to doubt in meaning, and to delay in the progress of the trial or to defeat the people's case. This may be a fair criticism, but it is not the law that is criticised but the lawyer. "An indictment is an accusation in writing, presented by a grand jury, to a competent court, charging a person with a crime." (New York Code.)

That prosecuting officers are inclined to multiply words in the indictment in specifying the crime charged, is to be conceded, but the point is made that there should be no attempt in an indictment to do more than to charge that a certain crime has been committed by the accused; murder, for instance, and that the method or manner of committing the crime should be left to the proof on the trial; that criminals escape through the variance between the allegation and the proof, which could not happen if the allegations were so general that there could be no variance between the allegation of the indictment and the proofs upon the trial. I do not think this point is well taken. The idea expressed holds human life too cheaply. The best way for a man to get right on this point is to put himself into the place of the man who is brought into court to defend his life. It will require no argument to convince that man, whether he be guilty or not guilty, that he should be permitted to know specifically the acts with which he is charged. I do not mean the *legal name* of the law's conclusion from the acts, but the acts themselves, so far as that can be done. The indictment cannot be too specific in its charges to meet the want of such a man. The practice does not work injustice, but justice. The right that I think should be accorded me, I will concede to my fellows. The Golden Rule should be a familiar and satisfactory law in a Christian land.

There will be delay often, in bringing on a trial after a prisoner is arraigned. This is inevitable. Counsel must have time to prepare for the trial. The court is wrestling with a heavy calendar and cannot soon reach the case. The organic law of our land provides that a person charged with the commission of a crime

shall have a speedy trial. This is in favor of the accused, and not of the people. But the accused must have time for preparation and the delays incident to this stage of the case are not subject to fair criticism.

The law is technical. A motion to quash the indictment may succeed on technical grounds. To eliminate technicality from the law, is to substitute judicial discretion for the law. There is a point where law begins and another where it leaves off. On one side of a hair line a man is guilty and on the other side he is not guilty. This must be so. When this sharp demarcation is destroyed then it is left, not to the law, but to some man to say, that a crime has or has not been committed; that the acts charged constitute a crime, not as definitely and specifically defined by law, but rather as conceived in the mind of a judge. If men when elected to the bench could leave behind them all of human frailties, and all alike could possess such qualities of spirit, there might be less objection to vesting them with such a wide discretion.

Our judges are conscious of their own humanity and are not inclined to go beyond the construction of the law in criminal procedure, and to give the accused the benefit of any reasonable doubt, which is a wholesome rule of law.

The bail bond comes in for some share of complaint. Bail is a door through which some accused men escape, yet it is too valuable a provision of the law to be seriously condemned. Whether the unbailable offenses should be multiplied is a fair question. But this point does not call for discussion here.

The accused is entitled to a trial by jury. Much time may be spent in impanelling a jury to try the case. This delay may be necessary and without fault of the law or of the administrators. There are times when some cases of great public concern are occupying the courts, and through the press the public is kept informed of every detail of the procedure. The thought of the people is kept active with the incidents of the trial. The feature that is not understood is liable to receive criticism. It is the extraordinary case that fixes the attention of the people. The five thousand cases that are only ordinary and that are occupying the courts, wherein the same rules of law obtain, as in the extraordinary case, pass without attracting attention. Of course every lawyer knows the difficulty in selecting twelve men to try a criminal case. The rules of law are the same in all cases, but the difficulties are not the same in all cases. If some crime is com-

mitted of which the public has or takes no special notice, and which involves issues of no extraordinary sort, it is not difficult to impanel a jury from the county to try the case, because the men called from the county to hear the case are unprejudiced as they are ignorant of the facts and unacquainted with the party. In such a case the propriety and fairness of the rules of procedure would not be questioned. The impaneling of the jury might occupy twenty minutes and perhaps a day, depending on circumstances. But with the extraordinary case it is very different. The blowing up of the Times Building in Los Angeles, was such a stupendous piece of work that the public being thoroughly informed as to the facts became greatly excited. Probably there were few, if any, intelligent people in California who did not read the facts as detailed to them in the public press, and form an opinion based thereon. When the McNamaras were arrested, the excitement, if possible, increased, and men became incompetent to impartially decide as to the guilt or the innocence of the men charged with the act. They had formed fixed opinions; they had passed private judgment in the case. Then, again, the case involved the great issues between capital and labor, and the men were quite ready for that reason to entertain very decided convictions on the subject in controversy. A man to sit on a jury to hear the facts of a case presented, and from them to decide upon the guilt or innocence of the defendant, must be able to judge impartially. He cannot do that if his mind is controlled by a preconceived opinion. He must be free from influential prejudice. It would have been difficult for the average labor union man or the proprietor of the open shop, or the man whose business has been crippled by strikes and boycotts, to consider the case with an impartial mind and do justice to the accused or to the people, as the case might be. The difference between the extraordinary case and an ordinary case is easily seen. Neither side could consent to submit the case to prejudiced and incompetent men, but to find the men competent and free to act became a difficult thing. This is all very clear and reasonable. Had either counsel been less cautious, room for unfortunate work would have been made and great harm resulted. The one inherent difficulty in the organization of the trial jury is developed in the extraordinary case. It is overcome there, even, and the case is disposed of as are ordinary cases, but time is consumed and *there* seems to be the rub. The tendency is to judge the entire system

by the difficulties that develop in the extreme or extraordinary case. In such a case the utmost limit of the law is put to the severest tension. There is no breaking down. The system holds good and is stable. The outcome justifies the confidence of the people in this venerable mode of determining questions of fact in legal contentions. But time is consumed! True enough, but it will be a sorry day for the country when *time* is esteemed to be the main thing to be considered in procedure in criminal cases. Tremendous issues are involved in the trial of men accused of crime, issues that reach far beyond the mere punishment of the guilty man, and it is the plain, simple duty of every good citizen to think carefully and soberly before condemning a law because it places the interest of the *man* above the mere matter of the time consumed in determining his guilt or innocence.

But the proceedings in the impaneling of a trial jury are to a great extent in the control of the judge presiding. He can prevent unnecessary delay, and can reduce to the minimum the proceedings of counsel that perhaps furnish the principal occasion for adverse criticism. The zeal and enthusiasm of attorneys do lead them often to an abuse of our procedural law that is intended effectually to enforce the rights of the people, while it protects the just rights of the accused. An ideal system requires ideal men to execute it. I am sure that the real source of the evil that men think they see in this case is in the judge and the attorneys who are in charge of the trial. A wise and resolute judge, with counsel who are able to appreciate the gravity of the issue, can eliminate the objectionable features of the trial, and merit the commendation rather than the condemnation of their lay fellow citizens, and redeem our procedure from much of the odium that is being cast upon it. Here is the place for reform, and that should be had.

The application of the rules of evidence in the trial of persons charged with having committed a crime, is capable of working delay in the final determination of the case. Perhaps there is no part of our legal system that is less clearly understood by the layman. In order to be able to pass judgment upon the rules of evidence, as to their reasonableness, wisdom and necessity, one must first *know* them. They are not simply a collection of rules arbitrarily fixed, nor are they the work of legislators, or of any sovereign authority. The rules of evidence are a development. There was no such thing in English law as a trial in the sense in

which we use that word, until the petit jury was instituted. Then the testimony of witnesses, and the introduction of evidence before twelve laymen who were to find and report the facts at issue, created the necessity of having rules to guide in the proceeding. Thus the rules of evidence had their beginning, and the centuries have seen their development. It is not too much to say that the rules of evidence are formulated after the known laws of the human mind. The Court of Justice finds its conclusions in the case under the same rules that govern the mental processes of the judge or the juror in the investigation. Thus the law of evidence has grown with the experience and increasing necessities of a developing people. Not a written law, but belonging to that great body of unwritten law, that has been evolved from the lives of a living people. That there are no unnatural growths found clinging to this great body I will not say, but whatever of these unhealthy parasites there may be discovered, they can be easily removed without harm to the health or harmony of the system, and they should be removed. That the rules of evidence can be abused and made an agency for delaying the final determination of the issues of a cause, I frankly admit. My contention here is that the source of this evil is in the men who conduct the trial rather than in the law. The better knowledge of the rules of evidence the trial lawyer possesses, the less will be our occasion for criticism, and the more resolutely the judge presiding shall conduct the proceedings under the law the less will be the delay in the final disposition of the case.

Expert evidence has received severe popular criticism, amounting to virtual condemnation. The recent Thaw case has brought the subject so glaringly to the public thought, where its possibilities of evil results have been so clearly demonstrated, that it has well-nigh come to be a disgrace to be called to testify as an expert witness. The popular thought is liable to go too far in condemnation. That expert witnesses are a necessity in the investigation of facts of a certain class, must be readily admitted. But it is charged that the expert testifies for the side that pays him. This is quite apt to be true and still furnish no ground for condemning either the system or the witnesses. Expert witnesses are usually called in cases that involve scientific problems. Upon all these questions, especially in a growing or developing science, two or three opinions will be entertained on the part of able or conscientious specialists. The attorney will employ the expert who is prepared

to support his view of the question, of course. Again, all allowance must be made for the ever present personal human factor that is so capable at all times of giving color to the proceedings. There is here, again, more to condemn in the conduct of the hearing than in the legal system. Every intelligent lawyer recognizes, and deplores the present status of this subject, and in the minds of our best men, a way of relief is being thought out. The body is sound, but it is being abused.

"Quick Work" in criminal cases is the cry. This is the natural outcome of the exciting criminal causes we have had and are now having which are being reported in the press. The judgment of the citizen is hastily formed, and that too, upon insufficient evidence. This is because the minds of men are easily excited and thus led to quick action and are thereby disqualified to do justly to the subject. I am bound to say that *quick work* in itself, is not what we want in criminal procedure. There may be anything but virtue in expedition in criminal cases. It is said that in England a man has been detected, arrested, indicted, tried, convicted, sentenced and hanged all in the space of two hours. That sort of thing is judicial lynching simply. It is impossible here, if the citizen has his constitutional rights assured him, or the people have the decisive word in the matter. It is this quick work in sending men to state prison or to the gallows that our fathers planned wisely and well to avoid and prevent. Holding up as an example to be emulated, some European government, does not appeal to me. I believe in the thoroughly Christian humanity of our own laws, and legal system, and I am not ready to approve any law of procedure that has in view the quickest legal immolation in prison or the taking the life of a citizen charged with crime. I believe that it is the *certainty* of punishment, rather than the nature or imminence of it, that most influences crime in our country. It is the steady, resistless process of working out even-handed justice, that is most effectual in deterring the commission of crime. Quick work gets quick riddance of the accused man, but does little else, and that is not altogether a worthy motive. There are a thousand sacred interests that a Christian civilization takes into account before it takes the liberty or life of a fellow man. The vengeful spirit demands a word and a blow in quick succession, but that is not the spirit of the law.

But there are delays caused by the slouchy manner in which the procedure is enforced. I have just read in the newspapers

of the decision of a criminal case on appeal to the New York Court of Appeals. The conviction was had in April, 1910, and an appeal was taken, and the appeal was brought on for argument in November or December, 1911. The Court in its opinion, noticed with some severity the unjustifiable delay in bringing on the argument. It is the living up to the spirit of our law in these cases that the country so greatly desires. If that can be realized, I do not think there will be found any considerable worthy criticism of our procedure in criminal cases. I have great faith in the wisdom and justice of our laws for the detection and punishment of crime. They have been formulated by a great liberty-loving, free people, and make paramount the life, liberty and happiness of the citizen. There are many things that must be said in elaborating the subjects herein above mentioned, but that is not the privilege of this writing. In these times of free discussion of our legal systems, mostly of an unfriendly character, it is important that the student of the law should be induced to consider soberly the great questions that are forced upon his attention, and be led to see the legal system in its completeness, and the harmony of its various parts, and thus be able to place a correct estimate upon the criticisms he may hear or read. This thought has been the inspiration of this paper.

James B. Brooks.